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No. 04-460

IN THE
Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Communications Act precludes the FCC's determination that cable modem service is not a "cable service."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the undersigned respondents state as follows:

No publicly held company owns an interest of 10% or more in NCTA, Charter Communications, Inc., Cox Communications, Inc., or Time Warner Inc.

Time Warner Inc. and Comcast Corporation, both publicly held companies, each have an interest of 10% or more in Time Warner Cable Inc.

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BRIEF IN OPPOSITION

In late August, the FCC and the United States filed a petition for a writ of certiorari (No. 04-281) seeking review of the Ninth Circuit's decision in this case, as did the undersigned cable parties (No. 04-277). Thirty days later, various municipal organizations filed what they characterize as a "conditional cross-petition." Whereas the petitions of the Government and the undersigned parties ask the Court to decide whether the Ninth Circuit erred in vacating the FCC's determination that cable modem service does not include a "telecommunications service," the Municipalities' filing asks the Court to decide whether the Ninth Circuit erred in affirming the FCC's determination that cable modem service does not constitute a "cable service." Although the Court should grant the petitions of the Government and the undersigned parties, it should deny that of the Municipalities — for three reasons.

1. The Municipalities' petition presents no question that is worthy of this Court's attention. With regard to the question raised by the Municipalities' petition (whether cable modem service constitutes a "cable service"), the Ninth Circuit's decision does not disturb the FCC's decision. The "cable service" issue therefore does not implicate the strong justification for review of lower-court decisions trumping the policy choices of agencies acting within their congressionally delegated authority.[1]

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[1] *See, e.g.*, Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* 244 (8th ed. 2002) ("*Stern & Gressman*") ("Except where a governmental or public body is a litigant and is able to demonstrate importance in terms of the public interest it represents, an issue the Court deems of interest and importance only to the immediate parties to the case is not likely to qualify as worthy of further consideration."); *id.* at 248 ("Particu-

In that sense, the Municipalities' petition is very different from those of the Government and the undersigned parties.

Moreover, the question that the Municipalities ask the Court to resolve is not a close one. Neither the FCC nor any court has endorsed the Municipalities' view that the statute unambiguously compels a "cable service" classification. Although a "cable service" classification was adopted by one district court,[2] it was rejected by two courts of appeals.[3] More importantly, the district court decision issued before the FCC spoke. Thus, it is unlikely that even that court would embrace a "cable service" classification again.

It is true that some of the undersigned parties argued in submissions to the FCC that the statute permits a reading under which cable modem service is simultaneously an "information service" and a "cable service," but the FCC rejected that interpretation. In the wake of the FCC's decision, the question is whether the agency's interpretation is unambiguously precluded by the statute. None of the undersigned parties has ever so argued, and, for the reasons set forth in the FCC's decision, we do not believe that it is.[4]

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larly where the Government is the petitioner, certiorari may be granted where the issues simply concern the construction of a major federal statute.") (internal quotation marks omitted).

[2] *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001).

[3] *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 876-77 (9th Cir. 2000); *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276-77 (11th Cir. 2000), *rev'd on other grounds sub nom. National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

[4] *See* Pet. App. in No. 04-281, at 118a-132a (¶¶ 60-69).

In particular, although the 1996 addition of "or use" to the definition of "cable service" (along with its accompanying legislative history) suggests that Congress intended some information services to be included, that amendment did not alter the requirement that there be "one-way transmission to subscribers."[5] Prior to the FCC's decision under review, the agency (with the D.C. Circuit's approval) had interpreted that phrase as requiring that the cable operator retain full control over the selection of transmitted content[6] — an interpretation that the Municipalities do not challenge. As the FCC permissibly determined, there is some such control in the case of cable modem service, but not enough to make for a "cable service."[7]

The Municipalities complain that, if the cable operator lacks content control, it must be exercised by subscribers — a conclusion that they say is inconsistent with the conclusion that cable modem service does not contain a separate "telecommunications service."[8] But the Municipalities never explain why that is so, and it is not. At most, the subscriber's exercise of control implies that there is "telecommunications" ("the transmission . . . of information of the [subscriber]'s choosing") for purposes of Section 3(43) — not that there is "telecommunications service" ("the offering of telecommunications for a fee directly to the public") for purposes of Sections 3(46).[9]

The Municipalities also rely on the Internet Tax Freedom Act's exception for "franchise fees," arguing that, if cable modem service were not a "cable service," there

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[5] *See id.* at 125a-126a (¶ 65).

[6] *See id.* at 121a-122a (¶ 62).

[7] *See id.* at 127a-131a (¶¶ 67-68).

[8] *See* Cross-Pet. 22.

[9] 47 U.S.C. §§ 153(43), (46).

would be no reason for this exception.[10] But, as the FCC correctly observed, in statutory construction, the views of a later Congress are entitled to little weight.[11] Moreover, the 1998 Congress may have included the exception to anticipate a possible agency interpretation that it viewed as permissible but not compelled.

2. The Municipalities' petition — which, as shown above, plainly is not certworthy on its own steam — becomes no more certworthy if the petitions of the FCC and the undersigned parties are granted. It is unconvincing for the Municipalities to suggest that, if the Court is going to address the regulatory classification of cable modem service anyway, it might as well place all available options before it.[12] Whereas the question whether the court of appeals erred in vacating the FCC's decision that cable modem service does not include a "telecommunications service" component is clearly worthy of this Court's attention, the question whether the court of appeals correctly affirmed the FCC's decision that cable modem service does not constitute a "cable service" is not, for the reasons set out above. It is not this Court's practice, once it has granted certiorari on one question, to sweep in all questions presented in the same case, whether independently certworthy or not.

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[10] *See* Cross-Pet. 10, 19.

[11] *See* Pet. App. in No. 04-281, at 131a-132a (¶ 69).

[12] *See, e.g.*, Cross-Pet. 13 ("the Court should grant review with all of the potential cable modem service classifications — 'information service,' 'cable service,' and 'telecommunication service' — before it").

Moreover, contrary to the Municipalities' suggestion,[13] their petition does not implicate the subsidiary issue raised in the initial petitions — whether the court of appeals erred in allowing *stare decisis* to prevail over the *Chevron* framework. The court of appeals' prior *Portland* precedent held that "cable service," when interpreted without *Chevron* deference, does not encompass cable modem service. After *Portland*, the FCC likewise determined that "cable service" does not encompass cable modem service. Plainly, then, if the court of appeals in the decision below had extended *Chevron* deference, it would have affirmed: it would not have found "unreasonable" a decision on all fours with its own precedent.

Nor can the Municipalities credibly argue that, if the Court grants the initial petitions, it can resolve the question presented in the Municipalities' petition without additional effort. As the Municipalities themselves point out, when a service is an "information service," it may or may not also be a "cable service."[14] Thus, agreeing with the initial petitioners that cable modem service is an "information service" without a separate "telecommunications service" component does not imply any answer to the question whether cable modem service is also a "cable

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[13] *See, e.g.*, Cross-Pet. 3 ("the Court's review is particularly appropriate here because, absent such review, this important question would be decided nationwide by the Ninth Circuit's decision based solely on what that court perceived as the *stare decisis* effect of its prior decision in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2002), without any meaningful judicial review of the merits of the arguments for the various possible classifications of cable modem service").

[14] *See* Cross-Pet. 6 ("unlike the 'information service' and 'telecommunications service' alternatives, the 'information service' and 'cable service' alternatives are not mutually exclusive").

service." That is a separate question, and it is not certworthy.

3. Finally, the Municipalities' filing improperly invokes Rule 12.5's 30-day grace period. Before this Court created that grace period by amending its rules in 1980, its absence "created problems for a party who did not want to petition or appeal unless his opponent did, usually because he had prevailed on the point or points most significant to him."[15] To be safe, such a party was compelled to file a possibly pointless petition on day 90, only to withdraw it later if the other side had not filed.[16] To obviate this waste of time and effort, the Court allowed 30 extra days to "a respondent seeking to file a conditional cross-petition."[17]

Rule 12.5 was thus designed to benefit petitioners who partially won and partially lost below and who are "willing to let stand the portion of the decision below that is adverse so long as the favorable portion of the decision is not overturned."[18] Nothing in the Municipalities' petition suggests that they fall in that category: there is no indication that they prefer the Ninth Circuit's "information service with telecommunications service component" classification over the "information service only" classification

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[15] *Stern & Gressman* 443.

[16] *See id.*

[17] Sup. Ct. R. 12.5; *see Stern & Gressman* 443 ("The new rule serves the purpose of, and obviates the need for, filing a conditional cross-petition that requested a granting of the writ only if the opposing petition was granted."); Bennett Boskeya & Eugene Gressman, *The Supreme Court's New Rules for the Eighties*, 85 F.R.D. 487, 504 (1980) ("Counsel who does not wish to appeal or petition for certiorari unless the other party does so may now wait and see what the other party actually does, and then act accordingly.").

[18] *Stern & Gressman* 443.

urged in the initial petitions. The Municipalities have not opposed those petitions and apparently urge the Court to grant them.[19]

Although Rule 12.5 can be read to permit any respondent — even one on the same side of the case as the initial petitioner — to take advantage of the 30-day grace period simply by labeling a filing a "conditional cross-petition,"[20] such filings add unjustified and pointless delay.[21] The Court can and should signal its disapproval by denying certiorari.

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[19] *See* Cross-Pet. at 3 ("Cross-Petitioners agree with the Federal Communications Commission and the United States ('Federal Petitioners') and the petitioners in No. 04-277 ('NCTA Petitioners') that the classification of cable modem service under the Communications Act presents an issue of exceptional importance worthy of this Court's review."); *id.* at 14 ("The Federal Petitioners and the NCTA Petitioners . . . request that this Court engage in [*Chevron*] analysis in the first instance. Cross-Petitioners join these petitioners in this sentiment.").

[20] *See Stern & Gressman* 443 ("Although one usually thinks of a cross-petition as opposing the position of the initial petitioner, the rules, read literally, do not contain any such limitation."); *but cf. Holtz v. Smith*, 519 U.S. 1038, 1038 (1996) ("The motion to treat an untimely petition for a writ of certiorari as a conditional cross-petition for a writ of certiorari is denied.").

[21] *See* Sup. Ct. R. 15.7 ("If a cross-petition for a writ of certiorari has been docketed, distribution of both petitions will be deferred until the cross-petition is due for distribution under this Rule.").

CONCLUSION

The petition for a writ of certiorari in No. 04-460 should be denied.

Respectfully submitted,

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